`IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 395 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA
HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? Yes

2 To be referred to the Reporter or not ?Yes

3 Whether their Lordships wish to see the fair copy of the judgment ? No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?No

5 Whether it is to be circulated to the civil judge ? No.

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ISMAIL @ USMAN KALU PATHAN - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
Ms. Nita Banker for for Appellant(s) : 1,
Mr.R.C.Kodekar,A.P.P. for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH

Date : 11/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE MD SHAH)

1. This appeal instituted under Section 374(2) of the Criminal Procedure Code, 1973 is against the judgment dated 23rd March, 1989 delivered by the learned Special Judge, Surat in Special Case no.28 of 1989 by which the appellant Ismail alias Usman Kalu Pathan is convicted of the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- in default, to undergo further simple imprisonment for two months. However, the appellant was acquitted of the offence punishable under Section 3(1)(10)(11)(12) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act,1989. It may be stated that the learned Judge has directed that the sentence imposed on the appellant shall run concurrently and the appellant shall be entitled to the benefit of set off.

2. The brief facts of the prosecution case emerging from the record are as under:

The complainant Bhanaji Makanjibhai is residing at village Varjankhan, Taluka Mandvi with his wife Jiniben and three daughters. According to the complainant, he maintains his family by doing labour work. The deceased Geetaben his second daughter got married to one Pravin and was residing with him at her matrimonial home. Out of the said wedlock there were three children i.e one son and two daughters. Thereafter, she obtained

divorce from Pravin and she went to stay at her father's house i.e. the house of the complainant alongwith her three children. It is the case of the complainant that Geetaben used to do masonary work at that time, however, on 21st December, 1996 she did not return back from her work and on making inquiry the complainant learnt that she (Geeta) had got married with the present respondent-accused Ismail alias Usman Kalu Pathan and is residing with him. After about two and a half months, she came to the house of her father the complainant and informed him that she got married with Ismail and that she is residing in a colony with him at village Rataniya on rental basis. Thereafter , 15 days prior to Diwali Geetaben came to the house of her father the complainant and told him that she wants to take her children with her to which the complainant refused. Geetaben then returned to the house of her husband the respondent-accused. On 22-12-1996 at 9.00 a.m. one Arjun Mansha who was residing near the house of the respondent-accused met the complainant and informed him that Geetaben is seriously ill and that the respondent-accused had gone to arrange for a tractor to take Geetaben to the hospital. Thereupon, the complainant, his wife and other persons went to the house of the respondent-accused where he found that Geetaben had died and that her dead body bore several injuries. According to him, he came to know from one lady that during the previous night deceased Geetaben was screaming and that the respondent-accused was present in the house. The complainant then lodged complaint before the PSI,

Mandvi Police Station who registered the offence. P.S.I. Rameshbhai Trivedi of Mandvi Police carried out the investigation. During the course of investigation, he recorded the statement of witnesses and also drew the Panchnama of the scene of offence in presence of the panchas, held inquest on on dead body of deceased and also made arrangements for sending the dead body of the deceased for post postmortems. In the meantime, the accused came to be arrested on 27-1-1997. At the instance of the respondent-accused the muddamal stick (Masalia) and other articles which were used in the commission of the crime was recovered. The Muddamal articles recovered during investigation were sent to the Forensic Science Laboratory for analysis. On completion of investigation, the appellant was chargesheeted in the Court of learned Judicial Magistrate, First Class, Mandvi . As the offence in question was exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Mandvi for trial, by the learned J.M.F.C. vide his commital order, where it was numbered as Special Case no.28 of 1997.

3. The learned Special Judge, Surat, to whom the case was made over for trial framed necessary charge against the appellant at Exh3. It was read over and explained to the appellant, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore examined as many as 15 witnesses and also produced documentary evidence like inquest Panchnama,

postmortem note, discovery panchnama, panchnama of scene of offence, report of Serologist, FSL report etc. in support of its case against the appellant.

4. After recording of the evidence of prosecution witnesses was over, the learned Judge explained to the appellant, the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In his further statement, case of the accused was that he has been falsely implicated in the commission of the crime and that a false case was filed against him. However, no defence evidence was adduced by the accused.

5. On appreciation of evidence adduced by the prosecution, the learned Special Judge held that it was proved by the prosecution that the deceased died a homicidal death. The learned Judge found that the prosecution proved its case beyond reasonable doubt against the appellant-Ismail alias Usman Kalu Pathan and held that the appellant had committed the offence punishable under Section 302, IPC and in view of the above referred to conclusions, the learned Judge has convicted the appellant and imposed sentence referred to above by judgment dated 23rd March, 1998 giving rise to the instant appeal. It may be mentioned that the acquittal of the appellant under Section 3(1)(10)(11) and 12 of the Atrocities Act is not challenged by the State in a separate appeal and that has

become final.

6. Ms.Nita Banker, learned Counsel for the appellant argued that though the name of one Arjun figures in the complaint given by the complainant, the police has not made any investigation with regard to involvement of Arjun and as such when Arjun is not prosecuted, the entire case of the prosecution becomes doubtful. It was also argued by the learned Counsel for the appellant that there being no eye witnesses to the incident and the chain of circumstances is not complete, the learned Special Judge ought not to have convicted the appellant. The learned Counsel argued that the circumstances from which the conclusion of guilt of the appellant is drawn are not fully established and therefore also, the impugned judgment should be set aside. According to the learned Counsel, except PW 5 Narmadaben Rajubhai all the witnesses had turned hostile and there being no direct evidence, the learned Special Judge has erred in basing the conviction on the sole evidence of Narmadaben. Lastly, it was argued by the learned Counsel that the learned Specal Judge has not appreciated the evidence in its true perspective, and therefore, the appeal should be allowed.

7. Lerned A.P.P. Mr. R.C.Kodekar on the other hand submitted that by adducing cogent and reliable evidence, the prosecution has proved its case against the appellant beyond reasonable doubt, and

therefore, the judgment of the learned Special Judge of the trial Court should be upheld by this Court. It was contended by the learned A.P.P. that the injuries sustained by the deceased Geetaben is proved by the testimony of the Medical Officer which is also corroborated by the documentary evidence, namely, the postmortem notes and certificate issued by Dr.Ullas Ballhandra dated 23-12-1996. According to the learned A.P.P., the learned Special Judge has correctly appreciated the evidence on record and has arrived at just and proper conclusion, hence, inteference by this Court is not warranted. The learned A.P.P. finally submitted that cogent and convincing reasons have been recorded by the learned Special Judge of the trial Court for convicting the appellant and as the learned Counsel for the appellant has failed to dislodge them, the appeal should be dismissed.

8. This Court has heard Ms. Nita Banker, learned Counsel for the appellant and Mr. R.C.Kodekar, learned A.P.P. for the State at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to the broad and reasonable probabilities of the case.

9. This Court shall now proceed to discuss the evidence. The prosecution has mainly relied on the evidence of five wintesses namely, Narmadaben Raju Amin, Arjun, Bhangur Jivan, Tejiben

and Dr.Ullas Ballhandra. PW 5 Narmadaben examined at Exh.10 in her testimony before the Court has stated that she was residing near the house of the appellant and the deceased Geetaben. According to her, at the time of the incident, the appellant accused and deceased Geetaben were residing together as husband and wife. It is also stated by this witness that on 21-12-1996 at 10,00 p.m. the appellant-accused and the deceased Geetaben were quarrelling and when the witness approached them on hearing screams, the appellant accused told her that Geetaben is his wife and that he can even kill her. Therefore, this witness went back to her house. This witness has also deposed to the effect that she had seen the appellant-accused inflicting brick and wooden stick blows to the deceased Geetaben. This witness has also identified the appellant-accused in Court as well as the Muddamal article no.7 used by the appellant-accused in the commission of the offence. This witness has further deposed to the effect that the appellant-accused had been to her house next morning and informed her that Geetaben was ill and that he was going to fetch a tractor for taking Geetaben to the hospital. PW 4 Arjun examined at Exh.9 in his testimony before the Court has stated that the appellant accused is known to him and he had identified the appellant-accused in Court. It is also stated by him that on 21-12-1996 at 10.00 p.m. some quarrel had taken place between the deceased Geetaben and her husband Ismail . According to this witness on the next morning he saw people gathered in the house of the appellant-accused and on

inquiry he found that Geetaben had died and Ismail was not there. He, therefore, went to the place of the complainant- the father of the deceased Geetaben and informed him that Geetaben was ill. According to this witness, on the next day the complainant-father of the deceased, her mother and other persons came to the house of the appellant-accused. PW 10 Bhangur Jivan examined at Exh.15 in his testimony before the Court has stated that he is residing at village Kosad; that the appellant had come to his house and the Investigating Officer had arrested the appellant-accused at his house. PW 3 Tejiben Ramjibhai examined at Exh.33 who happens to be the neighbour of the deceased Geetaben has stated in her testimony before the Court that on 21-12-1996 at 10.00 p.m. , the appellant accused and deceased Geetaben were quarrelling and that she had gone to separate them. PW 11 Dr.Ullas Ballhandra examined at Exh.26 in his testimony before the Court stated that he along with two other Doctors, namely, Dr.M.H..Quereshi and Dr.Kiran Pensuria had performed the postmortem on the dead body of the deceased Geetaben on 23-12-96 which commenced at 3.00 p.m. and completed at 5.30 p.m. The Doctor has categorically stated that on postmortem examination of the dead body of the deceased 14 external injuries and 10 internal injuries were noticed by him all of which were ante mortem. The Doctor has specifically stated that external injuries nos.8, 9 and 11 were serious and sufficient in the ordinary course of nature to cause death. As per the opinion of the Doctor internal injuries nos.8 and 9 can be

caused by hard and blunt substance and that these injuries are possible by the use of Muddamal article no.7 while the other injuries are possible by Muddamal articles nos.1 and 2. It is relevant to notice here that all the witnesses concerned with the incident except PW 5 had turned hostile.

10. Admittedly, there are no eye witnesses to the incident and no direct evidence is tendered before the Court. As such the whole case against the appellant-accused rests on circumstantial evidence, namely the conduct of the accused in absconding and the InvestigatingOfficer having to arrest him, the appellant- accused having been last seen in the company of the the appellant accused in his house, the presence of the accused at the scene of offence i.e. the house of the appellant-accused at the time and date of the incident and the medical evidence.

11. The law relating to circumstantial evidence is well settled. There cannot be any doubt whatsoever that with a view to satisfactorily prove the commission of a crime on the basis of circumstantial evidence, the prosecution must satisfy: (1) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established , (2) the circumstances should have a tendency to unerringly point the guilt towards the accused; and (3) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within

all human probabilities the crime is committed by the accused and none else. (See Sardar Khan v. State of Karnataka (AIR 2004 SC 1695).

12. Keeping in mind the above principles this Court has now to consider whether the charge against the appellant is proved. The first circumstance which is sought to be proved against the appellant accused is that on the day of incident i.e on the night between 21-12-96 at 10.00 p.m. and morning of 22-12-1996, the appellant-accused and the deceased Geetaben were present in their house at Rataniya village and that the deceased Geetaben was last seen alive in the company of the appellant-accused at their house.. To prove this fact the prosecution has examined witnesses PW 5 Narmada and PW 4 Arjun who in their respective evidence had deposed to the effect that the appellant-accused and the deceased Geetaben were residing together in their house at Rataniya village in a colony; that during the said period some quarrel had taken place between the appellant-accused and the deceased in their house. Witness Narmadaben had also deposed to the effect that on 21-12-1996 at 10.00 p.m. when she went to the house of the appellant on hearing screams on account of the quarrel that took place between the appellant-accused and the deceased Geetaben, the appellant accused told her that deceased Geetaben is his wife and that he can kill her, and therefore, she did not intervene and went back to her house. According to this witness, on 22-12-1996,

the appellant accused came to her house and told her that deceased Geetaben was ill and that he was going to arrange for a tractor. This witness has also stated that she had seen the appellant-accused beat the deceased Geetaben with bricks and wooden stick (Masalia). On re appreciation of the testimony of this witness Narmadaben, this Court finds that she has stated the facts before the Court in a normal manner. It is important to note that she being a neighbour her presence at the scene of offence is quite natural. Nothing has been brought on record to impeach the credibility of the evidence of this witness or even that of Arjun PW 4 who is an hostile witness. Both these witnesses, admittedly, are not related to the deceased Geetaben or for that reason to the complainant-the father of the deceased. They are independent witnesses. There is also nothing on record to show that these witnesses are on inimical terms with the appellant-accused. Under the circumstances, it cannot be said that the appellant-accused has been falsely implicated. Thus, the most incriminating circumstance against the appellant-accused, namely, that the deceased Geetaben was last seen in the company of the appellant accused in their house at Rataniya village on the night between 10.00 p.m. of 21-12-1996 and morning of 22-12-1996 stands satisfactorily proved through the testimony of witness Narmadaben.

13. Yet another incriminating circumstance which is sought to be proved against the appellant- accused is with regard to the conduct

of the accused in absconding. PW 5 Narmadaben and PW 4 Arjun in their respective evidence has in clear terms stated that the appellant accused was present in the house on the day of the incident i.e on the night between 21-12-1996 at 10.00p.m. And morning of 22-12-1996 and that he had left his house saying that he is going to fetch a tractor for taking the deceased Getaben to the hospital. It is interesting to note that the appellant-accused has since then not returned to his house and had to be arrested by the investigating Officer on 27-1-1997 from village Kasod. The Muddamal articles used in the commission of the offence was recovered at the instance of the appellant-accused. Thus, conduct of the accused in absconding, the statement made by the appellant-accused to witness Narmadaben that he can even kill his wife deceased Geetaben and the recovery of Muddamal articles are circumstances which clearly reveals the criminal mind of the appellant-accused.

14. The next circumstance against the appellant is the presence of the appellant at the scene of offence at the relevant time. Undoubtedly, the deceased Geetaben had died in the house of the the appellant-accused where they were residing as husband and wife. The dead body of the deceased bore several external and internal injuries which according to the opinion of the Doctor is possible by the use of Muddamal articles which were recovered at the instance of the appellant-accused. The Doctor has also opined

that the injuries sustained by the deceased Geetaben were sufficient in the ordinary course of nature to cause death. There is also nothing on record to show that the appellant-accused and deceased Geetaben bore enmity with any outsider or that any outsider had forcibly entered their house and caused her murder. The appellant-accused failed to bring anything on record to show that he was not present in the house (the scene of offence) at the time of incident i.e.on the night between 21-12-1996 10.00 p.m. and morning of 22-12-1996 whereas there is categorical statement made by the witness Narmadaben to the effect that the appellant was present in the house at the time of the incident and that some quarrel had taken place between the appellant -accused and the deceased Geetaben on the night of 21-1-1996 at 10.00 p.m. Not only that, witness Narmadaben has also stated in her testimony that in the morning of 22-12-1996, the appellant-accused came to her house and told her that deceased Geetaben was ill and that he was going to fetch a rickshaw for taking Geetaben to the hospital. Thus, the presence of the appellant -accused in his house between the night of 21-1-1996 at 10.00 p.m. and morning of 22-12-1996 i.e. the date, time and place of incident is fully established.

15. The stand taken by the learned Counsel for the appellant that though in the complaint the name of one Arjun figures, he has not been prosecuted and therefore, the entire story of the prosecution becomes doubtful cannot be accepted. Reading the evidence of

prosecution witnesses we could not find anything worth the name which even remotely involves Arjun in the commission of the offence except the fact that Arjun had gone to the complainant and informed him that Geetaben was ill. Merely because Arjun had given this information to the complainant it would be too much to conclude that there is involvement of Arjun in the commission of the offence.

16. The cumulative effect of abovementioned circumstances make it evident that the chain of circumstances is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the appellant. The circumstances established show that in all human probability, the act of murder of the deceased has been done by the appellant and the appellant alone.

17. On consideration of the cumulative effect of all the proved facts, this Court is satisfied that the conviction of the appellant under Section 302 I.P.C. as recorded by the learned Judge of the trial Court who had the advantage of observing the demeanor of the witnesses cannot be regarded as erroneous so as to warrant interference of this Court in the instant appeal. Moreover, in the present case, the fact that the incriminating circumstances proved were put to the appellant through his examination under Section 313 of the Code and in his further statement recorded under Section 313 he had merely denied the same. Therefore, such denial

is an additional link in the chain of circumstances to bring home the charge against the appellant.

18. The net result of the above discussion is that the prosecution has proved beyond reasonable doubt that the appellant had caused death of his wife Geetaben on the night between 21-12-1996 10.00 p.m. and 22-12-1996 by inflicting stick blows (Masalia) and brick blows. Therefore, the appeal which lacks merits is liable to be dismissed.

19. For the foregoing reasons, the appeal fails and is dismissed. Muddamal articles be disposed of in terms of the directions given by the learned Judge in the impugned judgment.

(R.P.Dholakia,J.)

(M.D.Shah,J.)

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